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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945. No. 815

PROVIDENT TRUST COMPANY OF PHILADELPHIA,
Petitioner,

v.

THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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INDEX.

PAGE

PETITION FOR WRIT OF CERTIORARI 1

Statement of the Matter Involved 2

Basis of This Court's Jurisdiction 5

Questions Presented 5

Reasons Relied Upon For Granting The Writ 6

BRIEF IN SUPPORT OF PETITION 9

I. Opinions of the Courts Below 9

II. Jurisdiction 9

III. Statement of the Case 9

IV. Specifications of Error 9

V. Summary of Argument 10

The Circuit Court of Appeals Disregarded the District Court's Findings of Fact Which Were Supported By Substantial Evidence 11

The Construction Placed Upon The Conditions Of The Bonds By The Circuit Court Of Appeals Is In Conflict With Applicable Pennsylvania Decisions 19

The Rule That The Contracts Of Paid Sureties Are To Be Construed Strictly Against Them, Has Not Been Followed By The Circuit Court Of Appeals In These Cases 27

The Decision Of The Circuit Court Of Appeals Contains Such A Fundamental Inconsistency That It Constitutes A Serious Departure From The Usual Course Of Judicial Proceedings .. 31

APPENDIX 1a

District Court Opinion 1a

Circuit Court of Appeals Opinion 15a

TABLE OF CASES CITED.

PAGE

Baglin *v.* Title Guaranty & Surety Co., 166 Fed. 356, 178 Fed. 682 (C. C. A. 3rd, 1909) 29

Biggs *v.* Mays, 125 F. (2d) 693 (C. C. A. 8th, 1942) 18

Boehm *v.* Commissioner of Internal Revenue, 90 L. ed. 96, —— U. S. ——. 15

Bogk *v.* Gassert, 149 U. S. 17 16

Commissioner of Internal Revenue *v.* Scottish American Investment Company, Ltd., 323 U. S. 119 13

Dunbar *v.* Fleisher, 137 Pa. 85, 20 Atl. 520 22

Fiumara *v.* American Surety Co., 346 Pa. 584, 31 A (2d) 283 28

Harper's Appeal, 64 Pa. 315 17

Herman *v.* Pepper, 311 Pa. 104, 166 Atl. 587 17

Hess *v.* Merion Title & Trust Co., 317 Pa. 501, 177 Atl. 53 28

Huston *v.* Regn, 184 Pa. 419, 39 Atl. 208 17

McCollum *v.* Braddock Trust Company, 330 Pa. 293, 198 Atl. 803 17

Mechanics Trust Co. *v.* Fidelity & Casualty Co., 304 Pa. 526, 156 Atl. 146.. 27

Monongahela Street Railway *v.* Philadelphia Co., 350 Pa. 603, 39 A (2d) 909. 28

National Mut. Casualty Co. *v.* Eisenhower, 116 F. (2d) 891 (C. C. A. 10th, 1940) 15

Nazareth F. & M. Co. *v.* Marshall Co., 258 Pa. 558, 102 Atl. 268 21

Purdy *v.* Massey, 306 Pa. 288, 159 Atl. 545 23

Sokoloff *v.* Fidelity & Casualty Co. of N. Y., 288 Pa. 211, 215, 135 Atl. 746. 28

Tennessee Coal Company *v.* Muscoda Local, 321 U. S. 590 13

United States *v.* Morrisdale Coal Co., 50 Fed. Supp. 138, (D. C. E. D., Pa., 1942) 21

United States *v.* U. S. Fidelity Co., 236 U. S. 512 13

Young *v.* American Bonding Company, 228 Pa. 373, 77 Atl. 623 .....19, 22, 33

IN THE
Supreme Court of the United States

OCTOBER TERM, 1945. No. .

Provident Trust Company of Philadelphia,
Petitioner,

v.

The Metropolitan Casualty Insurance Company of New York,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, respectfully prays this Court for the issuance of a Writ of Certiorari to the Circuit Court of Appeals for the Third Circuit, to review the final judgment of that Court entered on December 17, 1945, reversing the judgment of the District Court of the United States for the Eastern District of Pennsylvania entered on July 24, 1944.

A certified transcript of the record in this case, including the proceedings in said Circuit Court of Appeals, together with the requisite additional copies thereof, is furnished herewith, in conformity with Rule 38 of this Court.

STATEMENT OF THE MATTER INVOLVED.

This case and its companion case (No. 8847 in the Circuit Court of Appeals) were tried together by the District Court and they present identical questions for decision here. The only difference is that in the companion case the plaintiff is suing as trustee and not in its individual capacity, as it does in this case.

The plaintiff is a Pennsylvania corporation and the defendant is a New York corporation. The amount involved is more than $3,000.00 and the jurisdiction of the Federal Courts is based upon the diversity of citizenship.

Judgment was for the plaintiff, now petitioner, in the District Court for the sum of $457,012.31 (R., p. 354a). This judgment was reversed by the Circuit Court of Appeals for the Third Circuit. Since neither the opinions of the District Court nor the Circuit Court have been officially reported as yet, they are attached hereto in appendix form for the convenience of this Court.

The action is against a corporate surety, Respondent, on two bonds, of the type known commonly as "completion bonds", given in connection with two building operations. To facilitate the discussion and argument hereafter the matter will be treated generally as though only one bond and one transaction were involved. This treatment is justified since the bonds differ only as to the amounts involved and the names of the builders.[1]

The District Court made findings of fact which were based upon stipulations of counsel and the testimony of

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[1] Photostatic copies of each bond and attached documents appear in the record at pages 409a and 411a.

one witness (R., pp. 48a-69a, 104a-167a, 347a, 364a). These findings are the basis of the following discussion.

The transaction giving rise to this suit was a series of building operations in 1928. The promoter of the operation, Equitable Bonded Mortgage Company (hereafter sometimes called "promoter" or "Equitable") entered into a written contract with certain builders to advance money for the operation in return for mortgages on dwellings to be erected. The first mortgages were to go to Equitable and the second mortgages to Equitable's wholly owned subsidiary, Equitable Securities Corporation (R., pp. 55a, 219a, 337a, 326a, 342a). Equitable applied to petitioner trust company for a loan to obtain a substantial part of the necessary funds, the loan to be secured by the first mortgages covering the dwellings to be erected (R., p. 140a). The petitioner made an appraisal of the proposed buildings on a completed basis, and approved the loan subject to securing a surety bond to guarantee completion (R., pp. 140a-141a, 135a).

The required bond was executed by respondent surety and builder. Equitable was named therein as obligee, but Equitable simultaneously executed a written assignment to petitioner trust company, and even prior to delivery of the bond to Equitable the respondent surety executed its formal consent to the assignment. The bond, assignment, consent to assignment, power of attorney and statement of surety's financial condition were all bound together by surety and delivered to Equitable (R., pp. 48a, 51a). On the same day Equitable delivered the document to petitioner along with the mortgages and note (R., p. 338a).

The condition of the bond was as follows:

> "NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION IS SUCH, That if the buildings hereinabove mentioned shall be fully constructed and completed in accordance with the plans and specifications above

referred to, and herein incorporated with like force and effect as if attached hereto, free and clear of mechanics' liens and municipal claims, within twelve (12) months from the date hereof, then this obligation to be void; or else to be and remain in full force and effect."

The petitioner loaned Equitable a total sum of $312,000 on the two building developments; but none of the buildings was completed, and, in fact, they were hardly begun (R., pp. 50a, 106a).

The respondent surety raised several defenses in the actions on the bonds but the only one of significance here, in view of the decision of the Circuit Court of Appeals, is that based upon the fact that Equitable had breached the building agreement by failing to make the total required advances to the builder.

The District Court entered judgment for petitioner in the total amount, including interest at 3%, of $457,012.31 on July 24, 1944. Its decision was based on its finding of fact that the parties had intended that the bond should be a direct obligation from the builder and respondent surety to petitioner, and that, hence, a breach of the agreement between the builder and Equitable was immaterial.

The Circuit Court of Appeals reversed this judgment on December 17, 1945. It gave two reasons for so doing. First was its finding of fact, contrary to the District Court's, that the parties had intended only that the petitioner should take the bond by assignment, and thus the surety could raise the defense of non-performance under the builder's agreement since it could have done so in an action by Equitable, petitioner's assignor. Secondly, the Circuit Court held that under the law of Pennsylvania a bond such as this is not given for the completion of the buildings but for the performance of the building contract.

BASIS OF THIS COURT'S JURISDICTION.

This Court has jurisdiction of this case under Section 240(a) of the Judicial Code of 1911, as amended by the Act of February 13, 1925, Chap. 229, Sect. 1; 28 U. S. C. A. Sect. 347. The opinion and final judgment of the Circuit Court of Appeals were entered December 17, 1945.

QUESTIONS PRESENTED.

1. Where a surety company (respondent) executes its bond for the construction of dwellings, which bond it knew would be used as security to obtain funds for construction from a lender (petitioner), and formally consents to the assignment of that bond by the nominal obligee to the lender prior to delivery of the bond to the nominal obligee, and the District Court finds from the evidence the fact that the parties intended that the obligation should be a direct one from the surety to the lender, may the Circuit Court of Appeals overrule or disregard that finding? (Brief, *infra,* pp. 11-19).

2. Under the law of Pennsylvania is a bond conditioned on the construction of specified buildings one guaranteeing the construction of those buildings or one guaranteeing the performance of the building agreement when reference to that agreement appears only in the recital and not in the condition of the bond? (Brief, *infra,* pp. 19-27).

3. May a Circuit Court of Appeals disregard the important rule of law applied in Pennsylvania that contracts of paid sureties shall be construed strictly against them? (Brief, *infra,* pp. 27-31).

4. May a Circuit Court of Appeals apply two different standards of interpretation of written instruments in same case to the consistent benefit of a paid surety and the consistent detriment of an innocent assured? (Brief, pp. 31-33).

REASONS RELIED UPON FOR GRANTING THE WRIT.

The discretionary power of this Court to grant a Writ of Certiorari is invoked upon the following grounds:

1. The Circuit Court of Appeals for the Third Circuit has departed so far from the accepted and usual course of judicial procedure, based upon Rule 52(a) of the Federal Rules of Civil Procedure and decisions of this Court, in overruling a District Court's finding of fact as to which there is substantial evidence, that this Court should exercise its supervisory powers.

2. The Circuit Court of Appeals for the Third Circuit has decided important questions of Pennsylvania law as to the proper interpretation of surety bonds in conflict with applicable Pennsylvania decisions.

3. The Circuit Court of Appeals for the Third Circuit has departed so far from the accepted and usual course of judicial proceedings by applying inconsistently two different standards of interpretation to the contracts involved in this case that this Court should exercise its supervisory powers.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari be issued under the Seal of this Court, directed to the United States Circuit Court of Appeals for the Third Circuit, commanding said Court to certify and send to this Court on a day to be designated, a full and complete transcript of the record and all proceedings

of said Circuit Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court; that the judgment of said Circuit Court of Appeals be reversed; and that your petitioner be granted such other and further relief as to this Honorable Court may seem meet.

PROVIDENT TRUST COMPANY OF PHILADELPHIA,

By

WM. CLARKE MASON,

Counsel for Petitioner.

PHILADELPHIA,
February 5, 1946.

BRIEF APPLICABLE TO THIS AND COMPANION CASE IN SUPPORT OF BOTH PETITIONS.

I. OPINIONS OF THE COURTS BELOW.

The opinions of the District Court appear in the Record at pages 337a, 349a and 362a. They have not yet been officially reported. The opinion of the Circuit Court of Appeals, a part of the Record, has not yet been officially reported.

The opinions of both Courts are attached hereto in appendix form for the convenience of this Court.

II. JURISDICTION.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code of 1911, as amended by the Act of February 13, 1925, Chap. 229, Sect. 1, 43 Stat. 936, 28 U. S. C. A., Sect. 347.

The judgment of the United States Circuit Court of Appeals for the Third Circuit, which Petitioner seeks to have reviewed, was filed on December 17, 1945.

III. STATEMENT OF THE CASE.

The essential facts on which this application rests are stated in the foregoing Petition for Writ of Certiorari. Insofar as may be required for a clear understanding of the several points of the ensuing argument, these facts will be supplemented by further references to the Record.

IV. SPECIFICATIONS OF ERROR.

The error which Petitioner intends to urge, if the Writ of Certiorari is granted, is that the Circuit Court of Appeals erred:

In failing to follow the finding of fact made by the District Court that the parties intended that the bond should run directly to Petitioner to secure its loans.

In holding, contrary to applicable decisions of the Supreme Court of Pennsylvania, that a bond given to secure the completion of buildings is conditioned upon the performance of the building agreement and not the construction of the buildings, even though the building agreement is referred to only in a recital.

In failing to follow the Pennsylvania rule that contracts of paid sureties will be construed strictly against them.

In failing to apply a consistent rule of interpretation as to the several agreements involved.

V. SUMMARY OF ARGUMENT.

1. The Circuit Court of Appeals disregarded the District Court's findings of fact which were supported by substantial evidence.

2. The construction placed upon the conditions of the bonds by the Circuit Court of Appeals is in conflict with applicable Pennsylvania decisions.

3. The rule, sustained by Pennsylvania decisions and decisions of this Court, that the contracts of paid sureties are to be construed strictly against them has not been followed by the Circuit Court of Appeals in these cases.

4. The decision of the Circuit Court of Appeals contains such a fundamental inconsistency that it constitutes a serious departure from the usual course of judicial procedure.

The Circuit Court of Appeals Disregarded the District Court's Findings of Fact Which Were Supported by Substantial Evidence.

The District Court adopted the stipulation of facts as part of its special findings of fact, and stated that "The statements of fact in the opinion may be taken as additional special findings, supplementing or modifying the facts as stipulated, and answering such requests as are not covered by the stipulation" (Appendix, p. 11a).

The District Court found as a fact from the circumstances involved that it was the intention of the parties that the bond was to run directly to the petitioner to secure its loan despite the fact that the transaction was in the form of a simultaneous assignment of the bond.

In its opinion, sur motion for new trial, the District Court summarized its original findings by making the following statement (Appendix, p. 12a).

> "In reaching its conclusions the court examined the entire transaction and *found that the bond was intended to run directly to the plaintiff to secure its loan,* the plaintiff being the real obligee, that the building operation had been undertaken by, or through the medium of, Equitable Bonded Mortgage Company and that Equitable, although on paper an obligee, was in reality and to the knowledge of the plaintiff in the position of a principal along with the building contractor (the nominal principal)." (Emphasis supplied.)

Under Rule 52(a) of the Federal Rules of Civil Procedure, it is stated that findings of fact shall not be set aside unless clearly erroneous.

Despite this clear injunction as to the effect to be given to findings of fact made by the trial court, the Circuit Court of Appeals for the Third Circuit saw fit to overrule the aforesaid finding of fact by the District Court

that the parties intended the petitioner to be a direct obligee. The Circuit Court of Appeals said (Appendix, p. 20a): "We do not see that the various facts urged by the Plaintiff to show that Provident was a direct obligee, prove the conclusion." At the time the Court made this statement the conclusion was an express finding of fact by the District Court and was no longer merely Petitioner's conclusion.

That there is ample evidence to support the District Court's finding as to the intention of the parties is apparent from the following evidentiary facts also found by the District Court and affirmed by the Circuit Court of Appeals (Appendix, pp. 18a-19a):

(1) The Respondent surety knew that the Petitioner and not the Equitable Bonded Mortgage Company was to be the ultimate recipient of the bonds.

(2) The assignment and consent to assignment, by Respondent surety, were executed before the bonds were even delivered to the nominal obligee, Equitable Bonded Mortgage Company, by Respondent surety.

(3) In each case the bond, assignment, consent to assignment, power of attorney authorizing the execution of the bond and a statement of Respondent's financial condition, were bound together as one instrument by Respondent surety prior to delivery to the nominal obligee, Equitable Bonded Mortgage Company.

(4) The whole transaction of delivery by Respondent surety to Equitable Bonded Mortgage Company and then to Petitioner was completed on the same day so that Equitable held the bonds only momentarily.

(5) The Petitioner required that construction bonds be furnished as collateral before it would loan its money to Equitable Bonded Mortgage Company.

In the light of these basic facts it is impossible to say that the ultimate finding of the District Court was "clearly erroneous"; and it is only on such a basis that the Circuit Court of Appeals had the power to disregard it.

Prior to the adoption of Rule 52 (a) this Court had already held that an appellate court cannot review the evidence for the purpose of drawing its own inference or conclusion therefrom at variance with the trial judge's finding of fact. Thus, in *McCaughn* v. *Real Estate L. T. & T. Co.*, 297 U. S. 606, this Court reversed the judgment of the Circuit Court of Appeals for the Third Circuit on the sole ground that the Circuit Court had failed to follow the District Court's finding that a gift had been made in contemplation of death. It was there said (p. 608):

> "The instant case is controlled by the established rules relating to appellate review in actions at law where a jury trial has been waived. R. S. 649, 700; 28 U. S. C. 773, 875. Where a general verdict is found by the trial court, it has the same effect as the verdict of a jury. The appellate court cannot pass upon the weight of evidence. * * * The ultimate question for the decision of the trial court was one of fact and its general verdict was conclusive. The Circuit Court of Appeals was without authority to weigh the evidence and to make its own findings."

This decision was recently cited with approval by this Court in *Allen* v. *Trust Company of Georgia, et al,* October Term, No. 289, decided January 28, 1946.

In *Tennessee Coal Company* v. *Muscoda Local,* 321 U. S. 590, decided subsequent to the adoption of Rule 52 (a), this Court recently considered the binding effect of the District Court's finding of fact with respect to the alleged existence of a custom in the coal mining business for the payment of wages during underground travel. It was there said by Mr. Justice Murphy (page 602):

> "We thus cannot say that the District Court's findings as to custom and contract are so clearly erroneous as to compel us to disregard them."

In *Commissioner of Internal Revenue* v. *Scottish American Investment Company, Ltd.,* 323 U. S. 119, this

Court, speaking again through Mr. Justice Murphy, made the following statement, which is particularly pertinent in the instant cases (page 124):

> "The Circuit Courts of Appeal have no power to change or add to those findings of fact or to reweigh the evidence. And when the Tax Court's factual inferences and conclusions are determinative of compliance with statutory requirements, the appellate courts are limited to a determination of whether they have any substantial basis in the evidence. *The judicial eye must not in the first instance rove about searching for evidence to support other conflicting inferences and conclusions which the judges or the litigants may consider more reasonable or desirable.* It must be cast directly and primarily upon the evidence in support of those made by the Tax Court. If a substantial basis is lacking the appellate court may then indulge in making its own inferences and conclusions or it may remand the case to the Tax Court for further appropriate proceedings. But if such a basis is present the process of judicial review is at an end." (Emphasis supplied.)

In the instant cases the evidentiary facts were supplied by a stipulation and the testimony of one witness. As shown by the decision of this Court in the *Scottish American* case, *supra,* the conclusion of ultimate fact as to the intention of the parties by the District Court, is in itself a fact which cannot be disturbed unless clearly erroneous. The Circuit Court's misconception as to the conclusive nature of the District Court's findings based upon the undisputed evidentiary facts is apparent from the following statement in its opinion (App., p. 18a):

> "There were no conflicts of testimony to be resolved at the trial. Most of the facts were stipulated and the testimony of the one witness, A. G. Scattergood,

> Vice-President of the plaintiff, was not disputed but relied on by the defendant. Our question becomes, therefore, what is the legal conclusion to be drawn from facts rather than what are the facts themselves."

. It has been held by this Court that, insofar as the binding nature of the findings of fact are concerned, there is no difference between those which are based on stipulation and those which are based upon disputed testimony. Thus, in *Boehm* v. *Commissioner of Internal Revenue,* 90 L. ed. 96 (not yet reported officially), the following statement was made (p. 100):

> "The circumstance that the facts in a particular case may be stipulated or undisputed does not make this issue any less factual in nature. The Tax Court is entitled to draw whatever inferences and conclusions it deems reasonable from such facts. * * * If it is in accordance, [with law] it is immaterial that different inferences and conclusions might clearly be drawn from the undisputed facts."

The foregoing opinions by this Court in the *Scottish American* case and in the *Boehm* case were rendered in deciding appeals from the Tax Court. However, since in such cases the findings can be disregarded if they do not have "any substantial basis in the evidence", those decisions can be applied equally well under Rule 52 (a) where the finding is conclusive unless "clearly erroneous". In *National Mutual Casualty Co.* v. *Eisenhower,* 116 F. (2d) 891 (C. C. A. 10th, 1940) the Circuit Court of Appeals for the Tenth Circuit adopted the same reasoning under Rule 52 (a) as this Court applied in the *Scottish American* case. It was there said (p. 894):

> "Contradictions and conflicts of evidence are for the trier of the facts, whether it be court or jury, and where the evidence and the inferences fairly deducible

> from it are such that reasonable minds may honestly draw different conclusions from them, it has been held by this court that the question is not one of law, but of fact, to be determined by the trier of the facts."

It does not clearly appear from the opinion of the Circuit Court of Appeals whether that Court considered the question one of fact or of law. At one point, as has been seen, the Court treated the issue as a factual one, and at another point it considered only the wording of the assignments apart from the surrounding circumstances, thus implying a legal question solely. However, the Circuit Court of Appeals was not at liberty to nullify the effect of the Trial Court's finding by considering it in any light other than as a finding of fact.

It has long been held that the giving and execution of contemporaneous agreements, under circumstances which indicate that the parties intend to achieve a different result thereby than that apparent on the face of the instruments, makes the interpretation of the contemporaneous agreements a question of fact to be decided by the jury or by the judge, if sitting alone, as in this case.

The most revealing case on this subject is *Bogk* v. *Gassert,* 149 U. S. 17, decided by this Court in 1893. In that case two deeds, an agreement to reconvey, and a lease, all for the same land, were executed simultaneously by the parties. The suit was on the lease. The other contemporaneous agreements were put in evidence by the defendant along with other evidence as to the intention of the parties, asserting that the whole disclosed that the parties had intended a mortgage. This Court there said (page 29):

> "The case was evidently a proper one to go to the jury, who were left to determine the question whether the instruments were *intended* as a mortgage, and were instructed that, if they found them to be such, the plaintiffs could not recover." (Emphasis supplied.)

The foregoing rule also applies in Pennsylvania. Thus, in *Harper's Appeal,* 64 Pa. 315, it was held by the Pennsylvania Supreme Court that *the finding by the Trial Judge* that an absolute deed accompanied by a separate instrument, in which the grantee agreed to reconvey the property at the grantor's request within three years, was intended to have the effect of a mortgage, would not be disturbed on appeal without a conclusive showing to the contrary. It was there said (page 319):

> "Accepting the opinion of the court below as the report of a master upon the evidence, we see no plain mistake in the conclusion at which they arrived, that the agreement of March 19th 1858 was cotemporaneous with the deed of March 18th 1858, from Gubbings and wife to Harper. Without very clear and persuasive evidence that the sale was an absolute one, and the agreement to reconvey a subsequent, distinct and independent contract, we must treat the transaction as a mortgage. Such, undoubtedly, is the result of the authorities in this state: Colwell *v.* Woods, 3 Watts 188; Kerr *v.* Gillmore, 6 Id. 405; Jaques *v.* Weeks, 7 Id. 261; Brown *v.* Nickle, 6 Barr 390; Reitenbaugh *v.* Ludwick, 7 Casey 131; Wilson *v.* Shoenberger's ex'rs., Id. 295."

Likewise, in *Herman* v. *Pepper,* 311 Pa. 104, 166 Atl. 587, the Pennsylvania Supreme Court did not disturb *the finding of a Court of Equity* that an assignment of a partner's interest, absolute on its face but in fact given as security for a loan and accompanied by a separate agreement to reassign upon payment thereof, was in fact a pledge.

See also *Huston* v. *Regn,* 184 Pa. 419, 39 Atl. 208; and *McCollum* v. *Braddock Trust Company,* 330 Pa. 293, 198 Atl. 803.

The instant case is indistinguishable in principle from *Bogk* v. *Gassert, supra,* and the other cases cited above.[2] The bonds, assignments thereof and consents were executed contemporaneously. In fact, the assignments and consents were executed in advance of the time that the bonds became effective by delivery. Under such circumstances the intent of the parties was a fact to be determined by the trial court from all the circumstances, and, once having been determined, the Circuit Court of Appeals was not at liberty to set it aside unless clearly unsupported by evidence.

In *Biggs* v. *Mays,* 125 F. (2d) 693 (C. C. A. 8th, 1942), the Circuit Court of Appeals for the Eighth Circuit considered itself bound to follow Rule 52(a) in a case similar to the instant ones. In that case the question was whether the acts and words of a debtor constituted a promise to pay which had tolled the running of the Arkansas statute of limitations, a question of fact under the Arkansas law. The Court said (p. 699):

> "The court below found specifically that 'the facts do not justify any inference of a promise to pay the note as demanded by the claimant.' Under the law of Arkansas, as outlined above, the inference of a promise to pay *is one of fact,* and the finding of the court is binding unless clearly erroneous. Rule 52(a) of the Rules of Civil Procedure, 28 U. S. C. A. following section 723c."

In the instant case in arriving at its determination that the parties intended merely an ordinary assignment, the Circuit Court of Appeals for the Third Circuit ignored the following Federal Rules: (A) That an appellate court shall not draw its own conclusions and inferences from the evidence; (B) That findings based on

[2] The Circuit Court appears to have disregarded the principle of these cases in the mistaken belief that the decisions were based upon reliance upon superior skill, mistake or domination of one party by the other. That such is not the case is apparent from even a cursory reading of the opinions.

undisputed facts are as conclusive as those based on disputed ones; and (C) That a finding of fact shall not be set aside unless clearly erroneous.

Thus, we have here a situation in which the Circuit Court of Appeals has disregarded an express finding of fact by a District Court, supported by substantial evidence, which fact is not only relevant but is determinative of the issues involved in these cases. The writ should issue to correct this abuse of appellate review.

The Construction Placed Upon the Conditions of the Bonds by the Circuit Court of Appeals is in Conflict with Applicable Pennsylvania Decisions.

The Circuit Court of Appeals based its decision as to the proper interpretation to be placed upon the condition in the bond on the following statement of what it considers to be the law of Pennsylvania (Appendix, p. 22a):

> "If the Young case (Young *v.* American Bonding Company, 228 Pa. 373, 77 Atl. 623) is in point, we think it establishes the proposition that the words used in this type of bond which, in turn, contains a reference to a contract, makes performance of the surety's promise conditioned upon the non-performance of the main contract by the principal debtor."

Following this statement of its concept of the law of Pennsylvania, the Court held that the condition of the bond should be construed in the light of the terms of the contract mentioned in the recital. Hence the failure of the nominal obligee to perform under the contract constituted a defense for the surety.

This statement of the law is correct only if the reference to the contract appears in the *condition* of the bond. It is totally incorrect if the reference to the contract appears merely *in a recital* of the bond, as in these cases.